IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 267 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MOHAMMED HANIF MOHAMMED SIDDHIQUE MEMON & OTHERS - Appellants

Versus

STATE OF GUJARAT - Opponent

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Appearance :
MR IM KAPOOR WITH MR RAJESH M AGRAWAL for the Appellants.
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 17/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973, is directed against judgment dated February 9, 2001, rendered by the learned

Additional Sessions Judge, Court No. 11, Ahmedabad City in Sessions Case No. 108 of 1999, by which the appellant No. 1 is convicted for commission of offence punishable under Section 20 (b) (ii) whereas appellants Nos. 2 and 3 are convicted for commission of offence punishable under Section 20 (b) (ii) read with Section 29 (1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the Act”, for short) and each of the appellant Nos. 1 and 2 is sentenced to RI for 12 years and fine of Rs. 2,00,000/- (Rupees Two Lakh Only), in default RI for 1 year whereas the appellant No. 3 is sentenced to RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 6 months.

2. The facts emerging from the record of the case are as under:-

On March 9, 1999, at about 4.00 PM, a squad of Crime Branch, comprising Police Inspector Mr. T.A. Barot, Police Sub-Inspector Mr. P.P. Bhatt, Police Sub-Inspector Mr. G. H. Khan and others, was on a patrol duty in Maninagar area of Ahmedabad City. The members of the squad were checking the vehicles on road near Maninagar Railway Station. At about 4.30 PM, PSI Mr. Khan

signalled a tomato coloured Maruti Van bearing registration No. GH-1-BP-105 to halt. Accordingly, the driver of the said vehicle stopped the vehicle. On search of the van, a plastic-bag was found lying near the break pedal between the legs of the appellant No. 1, who was driving the van. The appellant No. 2 was found sitting in the front seat, which was by the side of the driver, whereas the appellant No. 3 was found sitting in the rear seat of the van. It was suspected by PSI Mr. Khan that the substance kept in the plastic-bag was *charas*. He, therefore, called PI Mr. Barot, who was head of the squad, to do needful in the matter. As it was necessary to seize the substance found, services of two *panch-witnesses*, namely, Bundukhan Yakubkhan Pathan and Manubhai Jabbarbhai Rajput were requisitioned. The search of plastic-bag resulted into find of 29 black coloured Globular Masses of *charas*. In order to ascertain characteristic and nature of the substance found, an expert from Forensic Science Laboratory (FSL) was requested to be at the spot. Accordingly, Mr. Sharma, who was Scientific Officer in FSL, came to the spot. He examined the substance kept in the plastic-bag and opined that the substance was *charas*. Meanwhile, services of a goldsmith were requisitioned to weigh the substance

found. The goldsmith came to the spot and weighed the substance. The weight of the substance was found to be 3.370 Kgs. On demand, none of the appellants could produce any pass or permit authorising to possess *charas*. As *charas* was found from the van, it was suspected that the appellants might be carrying *charas* on their person. Accordingly, it was decided to search their persons also. Before effecting search of person of each of the appellants, an offer was made to carry out search in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the three appellants. Thereupon, the person of each of the appellants was searched but nothing incriminating was found. From the 29 Globular Masses seized, small quantity in pieces was taken roughly weighing 100 Grams. The substance so taken out was divided into two parts, each weighing 50 Grams. Each part of 50 Grams was placed in a plastic-jar. After closing the lid of plastic-jar, slip bearing signatures of *panch-witnesses* was placed. Thereafter, twine was applied thereon and the jar was sealed with seal bearing inscription of *"PI NDPS Cell, DCB Ahmedabad City."* PI Mr. Barot drew *panchnama* regarding search of van and seizure of *charas* therefrom in presence of *panch-witnesses.* PSI Mr. Khan lodged his complaint and handed-

over *muddamal*, *panchnama*, etc. along with the appellants to PSO Mr. Serumian of DCB Crime Branch Police Station. PSO Mr. Serumian handed-over *muddamal* for safe custody to Crime Writer Head Rumalji Shivaji Sodha. *Muddamal* was despatched to FSL for analysis through Head-Constable Jorubha Salubha. The complaint of PSI Mr. Khan was handed-over to PSI Mr. R. B. Joshi for investigation. The Investigating Officer recorded statements of those persons who were found to be conversant with the facts of the case. The report of the FSL indicated that the substance analysed was *charas* within the meaning of the Act. The interrogation of the appellants revealed that they were supplied *charas* by one Alihussain Bakarali Saiyed of Borsad and Alihussain Bakarali Saiyed had obtained quantity from one Gullo Kashmiri. On completion of investigation, the three appellants with Alihussain Bakarali Saiyed were charge sheeted in the Court of learned Special Judge, Ahmedabad for commission of offence punishable under the Act. In the charge sheet, Gullo Kashmiri was shown as absconding. On the basis of said charge sheet, Sessions Case No. 108 of 1999 was registered against the appellants and Alihussain Bakarali Saiyed.

3. The original accused No. 4 i.e. Alihussain Bakarali Saiyed submitted an application at Exh. 3 on June 18, 1999 with a prayer to discharge him from the case, as, according to him, there was not an iota of evidence against him indicating commission of offence by him punishable under the Act. The learned Additional Sessions Judge, Court No. 9, Ahmedabad City, heard the learned Advocates of the parties and discharged original accused No. 4 Alihussain Bakarali Saiyed *vide* order dated September 13, 1999. That order was not challenged by the State and has become final.

4. Thereafter, the learned Judge framed necessary charge against the appellants at Exh. 15. It was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) *panch* Bundukhan Yakubkhan Pathan as PW 1, at Exh. 34; (ii) complainant PSI Mr. Gulamhussain Hamed Khan, at Exh. 47; (iii) Crime Writer Head Rumalji Shivaji Sodha, at Exh. 70; (iv) Police Station Officer Mr. Serumian Usmanmian Shaikh as PW 4, at Exh. 105; (v) Head Constable Jorubha Salubha as PW 5, at Exh. 111; (vi) Police Inspector Mr. Tarunkumar Amrutlal Barot as PW 6, at Exh. 115; (vii) Investigation Officer

Rameshkumar Bhavanishankar Joshi as PW 7, at Exh. 121; (viii) Scientific Officer of FSL Mr. Mohindersingh Jagiram Dahiya as PW 9, at Exh. 125, to prove its case against the appellants. The prosecution also produced documentary evidence, such as, *panchnama* indicating search of Maruti Van bearing registration No. GJ1-BP-105 and find of *charas* therefrom, at Exh. 36; complaint lodged by PSI Mr. G.H. Khan, at Exh. 48; entry made by PI Mr. Barot indicating that contraband substance was found from possession of the appellants, at Exh. 71; forwarding letter with which *muddamal*, etc. was handed over to PSO of Police Station, at Exh. 110; document indicating compliance of provisions of Section 50 of the Act, at Exh. 116; document indicating that grounds of arrest were communicated to the appellants, at Exh. 117; seizure memo issued under Section 100 (6) and 100 (7) of the Code of Criminal Procedure, 1973, at Exh. 118; report made by PI Mr. Barot to Assistant Commissioner of Police, at Exh. 119; report of FSL, at Exh. 123, etc. in support of its case against the appellants.

5. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further

statements, as required by Section 313 of the Code of Criminal Procedure, 1973. In further statement, each appellant claimed that a false case was foisted upon him. However, no defence evidence was led by any of the appellants.

6. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on March 9, 1999 at about 16-30 Hours, the appellant No. 1 was found in possession of *charas* weighing 3.370 Kgs without licence or permit in Maruti Van bearing registration No. GJ-1-BP-105 near Maninagar Railway Station, Ahmedabad and, therefore, was liable to be convicted for commission of offence punishable under Section 20 (b) (ii) of the Act. The learned Judge further held that it was proved by the prosecution beyond reasonable doubt that on the aforesaid date, time and place, the appellants Nos. 2 and 3 were also found sitting in the said Maruti Van along with the appellant No. 1, who was carrying *charas* weighing 3.370 Kgs and as they abetted the appellant No. 1 to commit the offence under the Act, they were liable to be convicted for commission of offence punishable under Section 20 (b) (ii) read with Section 29 (1) of the Act. The learned Judge did not accept the defence of the

appellants that a false case was foisted upon them. In view of abovereferredto conclusions, the learned Judge has convicted the appellant No. 1 under Section 20 (b) (ii) of the Act and the appellant Nos. 2 and 3 under Section 20 (b) (ii) read with Section 29 (1) of the Act and imposed sentences referred to earlier by judgment dated February 9, 2001, giving rise to instant appeal.

7. This Court has heard Mr. I. M. Kapoor, learned Advocate appearing for Mr. Rajesh M. Agrawal, learned Advocate of the appellants as well as Mr. K. T. Dave, learned Additional Public Prosecutor for the State at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. This is a case of chance recovery of *charas* and, therefore, provisions of Section 42 of the Act would not apply. Even otherwise, search was made and *charas* was seized by PI Mr. Barot, who is an empowered officer under Section 41 (2) of the Act and, therefore, also, the provisions of Section 42 of the Act would not apply. The evidence of complainant PSI Mr. Gulamhussain

Hamedkhan recorded at Exh. 47 read with that of PI Mr. Tarunkumar Amritlal Barot recorded at Exh. 115 and document produced at Exh. 116 satisfactorily establishes that the provisions of Section 50 of the Act were complied with. The record further shows that necessary report was forwarded by PI Mr. Barot to Assistant Commissioner of Police, as required by Section 57 of the Act. Therefore, the appellants would not be entitled to acquittal on the ground that mandatory provisions of the Act were not complied with before and after search and seizure of contraband substance.

However, this Court finds that no satisfactory evidence is adduced by the prosecution to establish that the same plastic-jar, which was containing part of the substance found from possession of the appellants and sealed, was sent to FSL for analysis. As observed earlier, a part of the substance was taken out and placed in two different jars. The plastic-jar was closed with lid. Thereafter, a slip bearing signatures of *panch-witnesses* and Police Inspector was placed at the top of the jar and it was tied with twine. The record shows that after tying the twine, seal having inscription of *“PI NDPS Cell DCB Ahmedabad City”* was applied. This is evident from the evidence of: (i) PSI Mr. G.H. Khan

recorded at Exh. 47; (ii) PI Mr. T.A. Barot recorded at Exh. 115, (iii) contents of *panchnama* produced at Exh. 36; (iv) complaint of PSI Mr. Khan, at Exh. 48; and, (v) relevant entries made in the Station Diary. It is nowhere indicated that after closing the plastic-jar with its lid, adhesive tape was applied around the jar. In fact, PI Mr. Barot, in paragraph-8 of his testimony, has in terms admitted that no adhesive tape was applied on plastic-jar in which part of the substance found from the possession of the appellants was placed. However, the testimony of Assistant Director of FSL Mr. Mohindersingh Jagiram Dahiya, recorded at Exh. 125, establishes that adhesive tape, applied on transparent plastic-jar which was cross-tied with twine and sealed, was found. This is stated by him in paragraph-2 of his testimony, which forms part of his examination-in-chief. The report of analysis produced by the prosecution at Exh. 123 also shows that adhesive tape was applied on the plastic-jar, which was received by FSL for analysis. This would indicate that the plastic-jar, which was sealed at the spot and the plastic-jar, which was sent to FSL for analysis, were different. It may be mentioned, at this stage, that at the spot three samples were prepared i.e. (1) to be sent to FSL for analysis; (2) to be treated as reserve sample; and (3) to be treated as residue sample.

On all these samples, slips bearing signatures of the *panch-witnesses* were found. However, the *panch-witness* Bundukhan Yakubkhan Pathan, in his testimony recorded at Exh. 34, has stated in his cross-examination, that his signatures were obtained on four different slips. This is to be found in paragraph-8 of his testimony, which is part of cross-examination by the learned Counsel of the appellant No. 3. Meaning thereby, the fourth slip could have been used on the plastic-jar, which was quite different from the sample prepared at the spot and sent to FSL for analysis. At this stage, it would be relevant to notice the testimony of witness Rumalji Shivaji Sodha recorded at Exh. 17. This witness in paragraph-5 of his testimony, which forms part of his cross-examination, has stated that in office of the Crime Branch, two seals are being maintained i.e. one having inscription of *"Inspector of Police, DCB Ahmedabad Saher"* and the other, *"Inspector of Police NDPS DCB"*. However, this witness has not stated that at the relevant time, there was a seal having inscription of *"PI NDPS Cell DCB Ahmedabad City"*. This would show that the seal, which was not being maintained in the office of Crime Branch, was applied on the plastic-jar which was sent to FSL for analysis. The above discussion would show that what was sent to FSL for analysis was altogether a different jar

than the one which was sealed at the spot. Once this conclusion is reached, it will have to be held that the prosecution has failed to establish satisfactorily that what was seized from Maruti Van was *charas* within the meaning of the Act. In view of absence of satisfactory evidence that the plastic-jar containing substance, which was found from possession of the appellants, was sent to FSL and that the said substance was *charas* within the meaning of the Act, this Court is of the opinion that the appellants would be entitled to reasonable benefit of doubt arising from the record of the case.

9. For the foregoing reasons, the appeal succeeds. Judgment dated February 9, 2001 rendered by the learned Additional City Sessions Judge, Court No. 11, Ahmedabad in Sessions Case No. 108 of 1999, convicting the appellant No. 1 under Section 20 (b) (ii) of the Act as well as the appellant Nos. 2 and 3 under Section 20 (b) (ii) read with Section 29 (1) of the Act, and sentencing each of the appellant Nos. 1 and 2 to RI for 12 years and fine of Rs. 2,00,000/- (Rupees Two Lakh Only), in default RI for 1 year as well as sentencing the appellant No. 3 to RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 6 months, is hereby set aside. The respondent is directed to set at liberty the

appellants forthwith unless presence of all or any of them in jail is needed with reference to any other case. *Muddamal* be disposed of in terms of the directions given by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath